Stevens Construction Corp. *and* Milwaukee and Southern Wisconsin Regional Council of Carpenters *and* Northern Wisconsin Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America *and* Laborers' International Union of North America, Local 464.[1] Cases 30–CA–15489, 30–CA–15883, 30–CA–16108, 30–CA–16109, 30–CA–16196

June 28, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On April 7, 2003, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[4]

More specifically, we adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by advising employee James Muir that it would be futile to support a union; threatening the termination of all employees if they ever unionized; threatening Muir with arrest and discharge for affiliating with a union or engaging in other protected concerted activity; and maintaining a no-solicitation and -distribution rule for nonemployees.[5] We also adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by barring Muir from returning to work on February 15, 2002, denying him the opportunity to earn wages for that day, and transferring him to another project because of his union affiliation and protected concerted activity;[6] refusing to hire union applicants Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, and Kurt Wise for available carpenter positions; refusing to hire union applicants Steve Cagle, John Matthews, and Karl Markgraf for available concrete laborer and/or cement finisher positions; and disciplining Muir on February 25, 2002.[7]

[1] We have amended the caption to reflect the disaffiliation of the Laborers' International Union of North America from the AFL–CIO effective June 1, 2006.

[2] We specifically adopt the judge's ruling denying the General Counsel's motion to amend the complaint by adding union applicants Shawn Dressler and Dan Larson as additional alleged discriminatees.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] In the remedy section of his decision, the judge provided for all discriminatees to be made whole as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950). However, as the Respondent's discriminatory conduct toward employee James Muir did not result in the cessation of his employment, his make-whole award is properly calculated as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). See, e.g., *CAB Associates*, 340 NLRB 1391, 1393 (2003). We shall amend the judge's remedy accordingly. We shall also modify the judge's recommended Order in keeping with this remedial amendment, and delete paragraph 1(a) because it does not correspond to any unfair labor practice alleged in the complaint or found by the judge. We shall substitute a new notice in conformity with the Order as modified.

[5] On the facts of this case, Member Schaumber agrees that the Respondent's maintenance of the rule violated Sec. 8(a)(1). In addition to the judge's findings, Member Schaumber notes that the maintenance of the rule is unlawful because of the chilling effect it would have on employees in the exercise of their Sec. 7 rights. Specifically, employees who read the rule in the employee handbook would be deterred from inviting the Union to the jobsite even at times or in areas where they might possess a Sec. 7 right to do so.

[6] The judge found that the Respondent took these actions because Muir telephoned OSHA to report safety violations at the jobsite and because he had announced that he was a union organizer. Member Schaumber notes that the Respondent did not except to the judge's finding that Muir's phone calls to OSHA were protected concerted activity and in fact concedes in its brief that they were.

[7] The Respondent first argues that it disciplined Muir on this date because he lied about talking to Production Manager Jim Ladika regarding safety issues at the Wisconsin Dells jobsite. The judge found this reason to be false and we agree.

The Respondent next argues that it disciplined Muir because he told two employees on two separate occasions that he was a foreman when, in fact, he was not. The judge found that Muir only told Scott Shanks, in early January 2002, that he was a foreman. Contrary to the judge, the record shows that Muir also told Ron Benhke, some time between February 18 and February 25, 2002, that he was a foreman at the Stoughton jobsite.

Despite this error by the judge, we nonetheless agree with the judge that the Respondent's discipline of Muir violated the Act. In doing so, we note that the Respondent did not discipline Muir in January 2002 after he first told an employee he was a foreman. Rather, the Respondent disciplined Muir after the second occasion that occurred in February 2002, and this second occasion was after Muir had engaged in protected concerted activity by calling OSHA to report safety violations at the jobsite and after he had announced that he was a union organizer. The decision of the Respondent to discipline Muir only after it was aware of his protected concerted activity and his status with the union, coupled with its giving the first false reason for the discipline discussed above, persuades us that the warning would not have been issued absent Muir's protected concerted activity.

In addition, we adopt the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by threatening a subcontractor's employee, Robert Hyatt, with discharge.[8] We also adopt the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act by disciplining Muir on February 22 and March 7, 2002,[9] or by refusing to hire union applicants Gary Miller and Aaron Zimmerman for available carpenter positions.

Contrary to the judge, however, we find that the Respondent violated Section 8(a)(1) by directing Hyatt, on April 13, 2001, to refrain from discussing the Union with its employees. The record shows that on one occasion Hyatt, an employee of a subcontractor, told Ted Roessler, an employee of the Respondent, that he would not have to pick up garbage if he was in the Union, and that "if you work for the union you get laid off any time you want." According to Roessler, Hyatt also said other things that he could not really recall but that "kind of made me upset." Roessler complained to Kast that Hyatt was interfering with his job responsibilities by talking to him about the Union.[10] Kast also overheard other employees of the Respondent complaining to each other that Hyatt was going out of his way to talk to them about the Union while they were trying to do their work. Kast and

[8] The General Counsel alleged that, on or about April 13, 2001, the Respondent violated Sec. 8(a)(1) by directing Hyatt to refrain from discussing the Union with Respondent's employees and threatening Hyatt with discharge if he failed to comply. As noted infra, we find that the directive to refrain from discussing the Union was unlawful. In analyzing the alleged threat, the judge apparently understood the General Counsel to be alleging coercive interrogation and mistakenly applied *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The correct standard is whether the alleged conduct "would tend to coerce a reasonable employee." *Madison Industries*, 290 NLRB 1226, 1229 (1988); *Without Reservation*, 280 NLRB 1408, 1414 (1986). Also, in determining whether an employer's statement violates Sec. 8(a)(1), we consider the "totality of the relevant circumstances." *Ebenezer Rail Car Services*, 333 NLRB 167, 167 fn. 2 (2001). Applying the appropriate standard, we nonetheless agree with the judge that there was no unlawful threat of discharge. After Hyatt objected to the direction to refrain from discussing the Union, Respondent's Production Manager Jim Ladika said to Hyatt: "You don't seem to understand what I'm saying, so maybe you'll understand later this afternoon." We agree with the judge that this statement did not constitute a threat of discharge.

In assigning error to the judge's finding in this regard, counsel for the General Counsel relies on *Paper Mart*, 319 NLRB 9 (1995). In that case, the Board found an implicit threat of discharge in the respondent's statement to an employee that if he was not happy, he could seek employment elsewhere, and the company would help with his "transition out." Ladika's statement is nothing like the statement found impliedly to threaten discharge in *Paper Mart*. Nor do we join our colleague in finding that statement unlawful as a threat of unspecified "negative consequences." The complaint alleged a threat of discharge, and due process constrains us to hold the General Counsel to his theory. See *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004).

Contrary to his colleagues, Member Walsh would reverse the judge's finding that the Respondent did not violate Sec. 8(a)(1) by threatening Hyatt when Ladika told him, on Friday morning, April 13, 2001, "You don't seem to understand what I'm saying, so maybe you'll understand this afternoon." Ladika's statement was a thinly veiled threat. As the majority points out, the correct standard for analyzing an alleged threat is whether the statement "would tend to coerce a reasonable employee." *Madison Industries,* supra, at 1229. Applying that standard here, a reasonable employee in Hyatt's position would likely construe the Respondent's statement as threatening discharge or other serious, negative consequences if he refused to give in to the Respondent's unlawful demand to stop talking about the Union. And in point of fact, the threatening nature of the remark was confirmed when Hyatt returned to work for his employer the following Monday, only to find out that he had been laid off. A charge was filed alleging that the layoff violated the Act, but it resulted in a settlement.

The majority asserts that, because the complaint alleged a threat of discharge but Hyatt did not testify that the Respondent's threat specifically related to discharge, due process forbids finding a violation. That statement turns due process on its head. The fact that the Respondent did not utter an express threat of discharge does not render unfair a finding that the Respondent threatened Hyatt with unspecified consequences; at trial, the Respondent was surely on notice of the gravamen of the allegation and therefore able to present a defense.

[9] In adopting these findings, Member Schaumber and Member Kirsanow find it unnecessary to pass on the judge's finding that the General Counsel did not meet his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Rather, assuming arguendo that the General Counsel met his initial *Wright Line* burden, Member Schaumber and Member Kirsanow find that the Respondent met its rebuttal burden by establishing that it would have taken the same action even absent Muir's protected activity.

Although he agrees with his colleagues that the Respondent did not unlawfully discipline Muir on February 22 and March 7, 2002, Member Walsh would find, contrary to the judge, that the General Counsel met his initial *Wright Line* burden on these issues. There is no question that the Respondent had knowledge of Muir's union and other protected concerted activities at the time that Muir was disciplined. Further, the record is replete with examples of the Respondent's general antiunion animus, as well as its animus toward Muir in particular for engaging in union and other protected concerted activities. As discussed above, within the same general time period as its February 22 and March 7 discipline of Muir, the Respondent: unlawfully told Muir that it would be futile to support a union and threatened the termination of all employees if they unionized; unlawfully threatened Muir with discharge and arrest for affiliating with a union; maintained an unlawful no-solicitation/no-distribution rule; unlawfully barred Muir from the Wisconsin Dells project and prevented him from being paid for the day because of his union affiliation and other protected concerted activity; unlawfully disciplined Muir; unlawfully instructed a subcontractor employee to refrain from discussing the Union; and unlawfully refused to hire union applicants. In the circumstances, Member Walsh finds that the General Counsel met his initial *Wright Line* burden. However, in agreement with his colleagues, he finds that the Respondent met its rebuttal burden by establishing that it would have disciplined Muir on February 22 and March 7 regardless of his union and other protected concerted activities.

[10] The record does not support the judge's finding that Roessler complained to Kast that Hyatt was "constantly" talking to him during working hours. Moreover, Roessler testified that he had only two conversations with Hyatt: the conversation about the union discussed above and an even briefer conversation about the college sweatshirt Roessler was wearing.

Ladika thereafter told Hyatt that they did not want him talking to their employees about the Union during working time.

An employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work. *Sam's Club,* 349 NLRB No. 94, slip op. at 3 (2007) (quoting *Jensen Enterprises,* 339 NLRB 877, 878 (2003)). Here, the record shows that the Respondent routinely allowed employees to discuss nonwork-related matters during working time.[11] Despite that fact, the Respondent issued a blanket prohibition against any talking about the Union during working time.[12] This prohibition violated Section 8(a)(1) because it only applied to conversations about the Union. Id.[13]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action necessary to effectuate the policies of the Act. Specifically, we shall order the Respondent to rescind the unlawful no-solicitation and -distribution rule for nonemployees and to advise employees in writing that the rule is no longer being maintained. We shall also order the Respondent to reimburse James Muir for the wages he lost on February 15, 2002 in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).

Also, we shall order the Respondent to offer Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Matthews, and Karl Markgraf immediate and full instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions. We shall further order the Respondent to make the discriminatees whole for any lost earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Stevens Construction Corp., Madison, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions.

(b) Threatening employees because of their union affiliation.

(c) Threatening to arrest or discharge employees for their affiliation with a union or for engaging in protected concerted activities.

(d) Maintaining a work rule that states "persons who are not employed by us are prohibited from soliciting any employee or distributing literature on jobsites, premises or at employee work locations at any time."

(e) Barring an employee from returning to work, denying him the opportunity to earn wages for the day, and transferring the employee from one project to another because of his union affiliation or protected concerted activities.

(f) Disciplining an employee because of his union affiliation or protected concerted activities.

(g) Refusing to hire applicants because of their affiliation with a union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Matthews, and Karl Markgraf immediate and full instatement to positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any others rights or privileges they would have enjoyed.

(b) Make Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Matthews, and Karl Markgraf whole for any loss of earnings and other benefits sustained by them as a result of the

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[11] Ladika and Kast testified that they had on other occasions told employees to stop talking when they were supposed to be working and to get back to work. This testimony is insufficient, however, to demonstrate that the Respondent had a policy prohibiting the discussion of all nonwork-related matters during working time.

[12] Thus, the Respondent did not limit its admonition to conversations that interfered with its employees' work or with production, even though that was the basis for the complaints made by its employees.

[13] Hyatt's conversation with Roessler took place during working time, and it is well-settled that an employer may lawfully prohibit solicitation of its employees during working time. *Our Way,* 268 NLRB 394 (1983) ("'working time is for work'"). We disagree, however, with any implication in the judge's decision that Hyatt's brief discussions about the union constituted solicitation. See *Waste Management of Arizona,* 345 NLRB No. 114, slip op. at 1 fn. 2 and 10–12 (2005).

discrimination against them, in the manner set forth in the amended remedy section of this decision and order.

(c) Rescind the work rule quoted above and advise the employees in writing that the rule is no longer being maintained.

(d) Make whole James Muir for the wages he lost on February 15, 2002 in the manner set forth in the amended remedy section of this decision and order.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Matthews, and Karl Markgraf, and to the discipline of James Muir on February 25, 2002, and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them and the discipline will not be used against them in any way.

(g) Within 14 days after service by the Region, post at its facility in Madison, Wisconsin, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 2002.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 28, 2007

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain an overly broad rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions.

WE WILL NOT threaten you because of your affiliation with a union.

WE WILL NOT threaten you with arrest or discharge because of your affiliation with a union or your protected concerted activity.

WE WILL NOT maintain the following work rule in our handbook:

> Persons who are not employed by us are prohibited from soliciting any employee or distributing literature on jobsites, premises, or at employee work locations at any time.

WE WILL NOT bar you from returning to work, deny you the opportunity to earn wages for the day, or transfer

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

you from one project to another because of your union or protected concerted activity.

WE WILL NOT discipline or otherwise discriminate against you because of your union or protected concerted activity.

WE WILL NOT refuse to hire applicants because of their affiliation with a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Matthews, and Karl Markgraf immediate and full instatement to positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed.

WE WILL make Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Matthews, and Karl Markgraf whole for any loss of earnings and other benefits sustained by them as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL rescind the rule quoted above and advise our employees in writing that the rule is no longer being maintained.

WE WILL make James Muir whole, with interest, for the wages he lost on February 15, 2002.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Matthews, and Karl Markgraf, and any reference to the discipline of James Muir on February 25, 2002, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them and the discipline will not be used against them in any way.

STEVENS CONSTRUCTION CORP.

Paul A. Bosanac, Esq., for the General Counsel
Douglas E. Witte, Esq., of Madison, Wisconsin, for the Respondent-Employer.
*Michael T. Kelley, Director of Organizing, o*f Kaukauna, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on January 7, 8, and 9, 2003, in Madison, Wisconsin, pursuant to Consolidated Complaints and Notice of Hearing (the complaint) issued by the Regional Director for Region 30 of the National Labor Relations Board (the Board) on November 26, 2002.[1] The complaint, based upon original and amended charges in the above noted cases was filed by Milwaukee and Southern Wisconsin Regional Council of Carpenters (the Charging Party or Union), Northern Wisconsin Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Charging Party or Union), and Laborers' International Union of North America, Local 464, AFL–CIO, (Local 464 or Union), alleges that Stevens Construction Corp. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that Respondent engaged in a number of independent violations of Section 8(a)(1) of the Act including threats to employees because of their union activities and maintenance in its handbook of overly broad solicitation and distribution rules. Additionally, the complaint alleges that the Respondent disciplined and took punitive actions against an employee, and has failed and refused to consider for employment and /or hire fourteen applicants because of their membership in and activities in support of the Union, in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged as a contractor in the building and construction industry in Madison, Wisconsin, where it annually purchased and received at its facilities and/or jobsites in Wisconsin, products, goods, and materials valued in excess of $50,000 directly from employers outside the State of Wisconsin. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

During the relevant time period herein, the Respondent employed approximately 120–130 employees that engaged in constructing residential, commercial, industrial, and/or office facilities in Madison, Wisconsin and throughout the State of Wis-

[1] All dates are in 2002 unless otherwise indicated.

consin. Prior to April 1, Jim Ladika held the position of Production Manager/Manager of Field Personnel and was responsible for hiring and establishing salary rates for employees. After April 1, Vice President of Operations Geoffrey Vine assumed these responsibilities. Dan Kast, David Mosel, Scott Shanks, and Carl Nelson serve in the capacity of Superintendents for Respondent, and are responsible for the day-to-day operations on a specific jobsite. Jamie Endrizzi is Respondent's Safety Director and oversees all areas of safety throughout the Employer's operation. Lastly, Dena Pavlick serves as the human resources manager handling employment applications and conducting employee interviews on Respondent's behalf.

B. Complaint 30–CA–15489 and 15883

1. The Facts

On or about April 13, 2001, Respondent was in the process of constructing a multistory apartment building in Madison, Wisconsin. Respondent contracted with Statz & Harrop, Inc. to complete the steel stud framing on the building. Statz & Harrop, Inc. and Respondent separately employ its own employees and supervisors on the apartment building construction project.

Shortly before the above date, Respondent's employee Ted Roessler complained to Superintendent Kast that an employee of Statz & Harrop, Inc. was interfering with his job responsibilities by constantly talking to him during working hours about organizing a union at Respondent and the benefits of such representation. Kast had also been informed by a number of other Respondent employees that they had experienced the same problems with this employee. Respondent inquired and then learned that the name of the Statz & Harrop, Inc. employee that was talking about the Union with Respondent's employees during worktime was Robert Hyatt. Accordingly, during the afternoon of April 13, 2001, at the worksite, Kast and Manager of Field Personnel Ladika approached Hyatt and informed him that they heard he had been talking union to Respondent's employees. Both Kast and Ladika informed Hyatt that they did not want him talking about the Union with Respondent's employees during work time. Hyatt responded that it was a free country and he would talk to whomever he pleased about the Union or anything else whenever he felt like it. Both Kast and Ladika reaffirmed to Hyatt that he should refrain from talking about the Union with Respondent's employees during work time. The conversation ended with Ladika stating, "You don't seem to understand what I'm saying, so maybe later this afternoon you'll understand." Upon returning to work the following Monday, April 16, 2001, Hyatt was laid off from his position with Statz & Harrop, Inc.[2]

In early January 2002, Ladika hired former employee James Muir as a construction Carpenter III at a salary of $18.50 per hour. Muir was assigned to the Wilderness Resort expansion project in Wisconsin Dells, Wisconsin under the supervision of Superintendent Shanks. At the time of his hire, Muir was employed by the Union as an organizer but did not inform the Respondent about his status. Muir continued to work on the Wilderness project throughout January 2002, without discussing the Union with Respondent's employees. On January 26, he dislocated his shoulder while working at home over the weekend. Muir notified Shanks and Human Resources Manager Pavlick that he would not be reporting to work on Monday and that he would be under a doctors care for at least the next week and unable to return to work. Muir informed Shanks that he hoped to be back to work full-time on February 15. During the course of their telephone conversation, Pavlick offered Muir the opportunity to come back to work on the Wilderness project as a Safety Monitor, a light duty position, at the reduced wage of $11 per hour. Although Muir was disappointed with the wage reduction, after reflecting on the offer overnight, he decided to accept and reported to the jobsite on February 11. Muir observed on his first day back to work that a number of the men were working on roofs without harnesses or tie-offs, which is a violation of Occupational Safety and Health (OSHA) regulations. He mentioned this to Superintendent Mosel on February 11, but nothing was done. Muir arrived at work on February 12, and observed that no ropes or fall protection gear was erected to protect the men who were still working on the roof. He mentioned this flagrant safety violation to Shanks who replied that the men should know better. Safety Director Endrizzi was on the jobsite that morning and Muir talked to him about the unsafe roof practices specifically that the men were working without harnesses or tie-offs. That afternoon, Endrizzi called a special meeting for all employees on the jobsite including Muir and discussed issues regarding fall protection while working on the jobsite (R Exh. 3). Muir also mentioned his concerns about fall protection to Ladika while he was making one of his routine visits to the jobsite. Muir, without informing anyone in authority at Respondent, telephoned OSHA prior to the special meeting to report unsafe working conditions on the jobsite when men were working without proper fall protection. Muir made the call because he did not believe that the Respondent was conforming to safety or OSHA regulations due to its failure of not requiring the men to wear harnesses when working on roofs or implementing other fall protection guidelines. The OSHA investigator did not immediately respond to Muir's initial telephone call so he placed a second call to OSHA during the morning of February 14. Later that morning the OSHA inspector arrived at the jobsite and talked with Muir and Endrizzi. After inspecting the jobsite, the investigator cited the Respondent for not providing a safe work environment when men were working on roofs or other locations where they could fall due to unsafe fall protection measures. After the departure of the OSHA investigator, Muir informed Endrizzi and Mosel that he was the individual who called and reported the safety violations to OSHA. Muir also informed both individuals that he was a union organizer and would be talking to Respondent employees about joining the Union. Endrizzi immediately telephoned Ladika and informed him that Muir was the indi-

[2] The General Counsel and the Respondent entered into a settlement agreement on February 8, resolving the layoff of Hyatt as alleged in Case 30–CA–15489 (GC Exh. 3). Thus, that portion of the complaint will not be addressed in this decision. Rather, the discussion that occurred between Hyatt, Kast and Ladika on April 13, 2001, will be addressed subsequently in the decision when considering whether the statements violated Section 8(a)(1) of the Act as alleged by the General Counsel.

vidual who reported the safety violations to OSHA and that he just announced that he was a union organizer. Ladika acknowledged that Endrizzi informed him about these matters. Ladika immediately telephoned the jobsite looking for Muir but was informed by Shanks that he had left for the day.[3] Ladika contacted Pavlick who provided Muir's cell phone number. Ladika placed a telephone call to Muir who received it while he was still in his car driving home. Ladika informed Muir that he was no longer needed at the Wisconsin Dells jobsite and that he would not be able to return to work until he provided a doctor's release. Muir informed Ladika that he would bring the doctor's note to the jobsite and give it to Shanks so it could be faxed to Ladika's attention. Ladika told Muir that he should not show up for work at the jobsite and if he did, he would be arrested for trespassing and fired. Ladika instructed Muir to go directly to the office on February 15 with the doctor's release and not show up at the jobsite. Upon arriving home, Muir telephoned Ladika to further discuss the matter. Ladika told Muir that he did not want to discuss the matter further and he should contact Pavlick if he had any further questions.

Prior to proceeding to the office on February 15, Muir stopped at his doctor's office and obtained a clean copy of the return to duty release form as the prior one had become illegible (R Exh. 4). Before Muir arrived at the office, Respondent's President, Endrizzi, Ladika, and Pavlick met to discuss the issue of Muir being responsible for initiating the OSHA investigation and announcing that he was a union organizer with the intent of recruiting Respondent's employees to join the Union. While the participants in this meeting decided they could not treat Muir any differently than any other employee, it was agreed that after receipt of the doctor's release form, Muir would be transferred to another jobsite where no further commotion from yesterday's OSHA visit could arise (R Exh. 54). Pavlick was instructed to contact Muir and ask him if he had the doctor's release form. She then telephoned Muir who inquired whether he still had a job or if he was fired. Pavlick apprised him that he did indeed still have his job and upon receipt of the doctor's release form she would start the process to get him back to work. Muir informed Pavlick that if he observed any further safety violations he would call OSHA and that when he did return to work he would be bringing union literature and would be talking to other employees to convince them to join the Union. The conversation ended and Muir agreed to be in the office within the hour with the doctor's release form.

Upon arriving at the office, Muir attended a meeting with Ladika, CFO Mark Rudnicki and Pavlick. Muir provided the doctor's release form to Pavlick who noted it was dated February 15. Muir apprised Pavlick that he went back to the doctor that morning to get a new form because the other one was hard to read. During the course of the meeting, Pavlick discussed the issue surrounding Muir leaving the jobsite at 3:30 p.m. on February 14, and after addressing Muir's intention to advocate for the Union, she obtained his agreement to distribute union literature and speak to Respondent's employees about the Union before and after work, during lunch or after work but not during work time. The meeting ended with Respondent stating that due to the situation with OSHA yesterday, they did not feel comfortable placing Muir back at the Wilderness jobsite and therefore, he was being reassigned to the First National Bank of Stoughton job starting next Monday, February 18. Muir responded that he would have no problem working at the Wilderness jobsite again. Respondent stated that it did not feel comfortable putting him back because an uncomfortable workplace environment would be created after yesterday and they did not want anyone to feel uncomfortable. Muir was instructed to report to the First National Bank jobsite on Monday (R Exh. 54).

[3] Shanks previously agreed that Muir's working hours would be 7 a.m to 3:30 p.m. due to child-care responsibilities. Apparently Shanks had not informed Ladika or Pavlick of this arrangement when Ladika attempted to reach Muir around 3:30 p.m. on February 14.

2. The 8(a)(1) allegations

The General Counsel alleges in paragraph 5 of the complaint that on or about April 13, 2001, at a multistory apartment building, Ladika and Kast directed that an employee refrain from discussing union with Respondent's employees working at that jobsite and threatened the employee with discharge if he failed to stop such activities.

The Board has held that interrogation is not a per se violation of Section 8(a)(1) of the Act. *Rossmore House,* 269 NLRB 1176, (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House,* 269 NLRB at 1177–1178. *Emery Worldwide,* 309 NLRB 185, 186 (1992). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House,* 269 NLRB at 1178 fn. 20 (1984); *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic,* 277 NLRB 1217, 1218 (1985).

Shortly before the above date, Respondent's employee Ted Roessler complained to Kast that an employee of Statz & Harrop, Inc. was interfering with his job responsibilities by constantly talking to him during working hours about organizing a union at Respondent and the benefits of such representation. Kast had also been informed by a number of other Respondent employees that they had experienced the same problems with this employee. Respondent inquired and learned that the name of the Statz & Harrop, Inc. employee that was talking about the Union with Respondent's employees during work time was Hyatt. Accordingly, during the afternoon of April 13, 2001, at the worksite, Kast and Ladika approached Hyatt and informed him that they heard he had been talking union to Respondent's employees. Both Kast and Ladika informed Hyatt that they did not want him talking about the Union with Respondent's employees during work time. Hyatt responded that it was a free country and he would talk to whomever he pleased about the Union or anything else whenever he felt like it. Both Kast and

Ladika reaffirmed to Hyatt that he should refrain from talking about the Union with Respondent's employees during work time. The conversation ended with Ladika stating, "You don't seem to understand what I'm saying, so maybe you'll understand later this afternoon."

Hyatt previously gave a sworn affidavit to the Board 4 days after the events in question on April 16, 2001. The affidavit confirms that Kast and Ladika instructed Hyatt not to talk about the Union with Respondent's employees during work time and does not mention that either Kast or Ladika threatened him with discharge if he failed to stop such activities. Likewise, in his testimony in the subject case, Hyatt did not assert that either Kast or Ladika threatened him with discharge if he failed to stop such activities.

The Board has consistently maintained the position that oral solicitations may be prohibited only during working time. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). Accordingly, I find that when Respondent representatives instructed Hyatt not to talk to Respondent's employees during working time about the Union it was privileged to do so. Moreover, I find that based on Hyatt's testimony, Respondent's representatives did not threaten him with discharge if he failed to stop talking to Respondent's employees about the Union during working time.

Based on the forgoing, I do not find that the General Counsel sustained the allegations in paragraph 5 of the complaint and recommend that they be dismissed.

The General Counsel alleges in paragraph 6 of the complaint that on or about February 14, at the Wilderness Resort project, Mosel advised an employee that it would be futile to support a union and threatened the termination of all employees if the employees ever unionized.

Muir testified that just before lunch he and Mosel were talking about the OSHA investigation. During that discussion, Muir told Mosel that he was a member of the Union and intended to organize Respondent's employees. Mosel, told Muir that "in no way would Stevens go Union, and if the Union bothered them again they would fire all their employees and sub out their work just like they do in California." Mosel ended the conversation by informing Muir that he did not believe in unions.

According to Mosel, he testified that he was a union member in the late 1970's and early 1980's but was not in favor of unions in general. He admitted that he told Muir, "that if he was Stevens, he would not bother with the Union and would sub everything out." Mosel denied the comments attributed to him by Muir that if the Union bothered them again they would fire all their employees and sub out their work just like they do in California.

While Mosel denied portions of the conversation, he admitted that a conversation did occur in which the Union was discussed. I am inclined to credit Muir's version of the conversation for the following reasons. First, Muir's testimony is fully consistent with his affidavit given to the Board approximately 1 month after the conversation took place. Second, Mosel admitted that he does not believe in unions and that "if he was Stevens, he would not bother with the Union and sub everything out." Third, Mosel denied that he was present on February 14 when Muir announced that he was a union organizer and was the individual that called OSHA. Endrizzi contradicted Mosel and testified that he was present when Muir announced he was a union organizer and was the individual that called OSHA. Fourth, Muir's testimony had a ring of truth to it and occurred just after he informed Mosel that he was a member of the Union and intended to organize Respondent's employees.

Based on the forgoing, I find that Mosel threatened an employee that advocating on behalf of the Union would cause the termination of all employees. Such statements tend to undermine Section 7 rights and are violative of Section 8(a)(1) of the Act.

The General Counsel alleges in paragraph 7 of the complaint that on or about February 14, by telephone, Ladika threatened an employee with arrest and discharge and implied union activity constituted disloyalty.

Ladika placed a telephone call to Muir who received it while he was still in his car driving home from work on February 14. Ladika informed Muir that he was no longer needed at the Wisconsin Dells jobsite and that he would not be able to return to work until he provided a doctor's release. Muir informed Ladika that he would bring the doctor's note to the jobsite and give it to Shanks so it could be faxed to Ladika's attention. Ladika told Muir that he should not show up for work at the jobsite and if he did, he would be arrested for trespassing and fired. Muir asked Ladika why he was responding in this matter, and Ladika said, "He had given me a job and I had stabbed him in the back."

The context of this conversation closely followed the time when Endrizzi informed Ladika that Muir called the OSHA investigator and that Muir had announced that he was a union organizer. Moreover, Ladika admitted in his testimony that he told Muir he was upset that he had telephoned the OSHA investigator and that if he showed up on the Wilderness jobsite he would have him arrested for trespassing and fired. Accordingly, I find that Ladika made the remarks alleged by the General Counsel in paragraph 7 of the complaint.

Based on the forgoing, I find that Ladika's statements violate Section 8(a)(1) of the Act.

3. The 8(a)(1) and (3) allegations

The General Counsel alleges in paragraph 8(a), (b), and (c) of the complaint that Ladika barred Muir from returning to the Wisconsin Dells jobsite, prevented him from being paid on February 15, and transferred Muir from Wisconsin Dells to the First National Bank project in Stoughton, Wisconsin.

The protected nature of Muir's and other employee's efforts to protest Respondent's actions concerning safety violations has long been recognized by the Board who has held that similar conduct comes within the guarantees of Section 7 of the Act. See *Joseph DeRairo, DMD, P.A.* 283 NLRB 592 (1987). The Board has also held in *Mike Yurosek & Sons, Inc.,* 306 NLRB 1037, 1038 (1992), that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group." In this case, I find that Muir's complaints, on his own and the employees' behalf about safety concerns on the jobsite fall within the ambit of protected con-

certed activity. However, it must be determined whether Muir was barred from returning to work, denied wages on February 15, and transferred to the First National Bank project based on such activity.

In *Wright Line,* 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

The evidence conclusively establishes that Muir initiated the OSHA investigation and openly announced that he was a union member and intended to organize the Respondent's employees. Indeed, Ladika acknowledged these facts before Respondent took the actions alleged in paragraph 8(a), (b), and (c) of the complaint. Moreover, I find that Ladika threatened Muir with arrest and discharge if he returned to the Wisconsin Dells jobsite because he was upset that Muir had contacted OSHA and announced that he was a union organizer. Thus, I find that antiunion sentiment was a substantial or motivating factor in the Employer's decisions alleged in the complaint.

Ladika admitted in his testimony that he stated on February 14 that he no longer wanted Muir on the Wisconsin Dells jobsite despite Shanks testimony that he never made a request to Ladika that he did not want Muir to return to the jobsite. Effective February 15, Muir was cleared by his doctor to return to full-time duty without restrictions and could have resumed his carpentry duties at Wisconsin Dells. I find the true reason that Muir was not returned to the Wisconsin Dells jobsite was because Ladika was upset that Muir had contacted OSHA, and that after Ladika went out on a limb to rehire Muir in January 2002,[4] he felt that Muir had stabbed him in the back by joining the Union and announcing that he intended to organize Respondent's employees.

Additionally, the evidence shows that Muir was directed to come to the office on February 15 with his doctor's release rather then reporting to the jobsite. Since the Respondent precluded Muir from reporting to work at the jobsite, he should have been paid his regular salary of $18.50 per hour for the entire day. Lastly, I find that Muir was transferred to the First National Bank of Stoughton jobsite because he initiated the OSHA investigation that resulted in a citation and openly announced that he was a union organizer. . Respondent by testimony (Ladika) and written memorandum to the file admitted this fact (R. Exh. 54).

Based on the forgoing, I find that the Respondent has not established that the same action would have been taken even in the absence of Muir's protected concerted and union activities. Therefore, I conclude that Respondent violated Section 8(a)(1) and (3) of the Act and sustain the General Counsel's allegations alleged in paragraph 8(a), (b), and (c) of the complaint.

The General Counsel alleges in paragraph 8(d) of the complaint that on or about February 22, Endrizzi disciplined Muir.

According to Muir, Endrizzi was at the Stoughton Bank project on February 22, and was watching him work. Muir testified that he was on an open ladder hanging an interior soffit. While in the process of completing the task, a board leaning against the wall started to fall. Muir attempted to catch the board turning his body around to a point where he was not facing the open ladder. At that moment, Endrizzi observed Muir and issued him a written warning for not facing the ladder (GC Exh. 4). Muir refused to sign the warning.

The General Counsel argues that Endrizzi issued the warning based on the fact that Muir had previously called the OSHA inspector approximately 10 days earlier and apprised Endrizzi that he was a union organizer. Indeed, Muir testified that on February 14, the day he informed Endrizzi that he called the OSHA inspector Endrizzi removed his glasses and stated to Muir that he only removes his glasses when he is upset. Additionally, after Muir apprised Endrizzi that he was a union organizer, Endrizzi said this is bullshit and threw his hard hat down and walked away. Endrizzi admitted that Muir informed him that he initiated the OSHA investigation and announced that he was a union organizer but both Endrizzi and Mosel denied that Endrizzi removed his glasses and threw his hardhat on the ground.

I am not persuaded that Endrizzi issued the safety warning to Muir based on his protected concerted or union activities for the following reasons. First, I am suspect of Muir's testimony concerning the actions of Endrizzi on February 14. In this regard, Muir gave a sworn affidavit to the Board on March 18, approximately 1 month after the incident on February 14, yet he made no mention of Endrizzi's conduct of removing his glasses and throwing his hardhat on the ground. Actions by Endrizzi, such as alleged by Muir, are highly significant and if they occurred would have been fresh in Muir's memory and should have been included in his sworn statement. Second, Endrizzi impressed me as a serious individual when dealing with safety issues on the jobsite. Indeed, 1 week before he gave Muir the safety warning, he had written a letter to one of the subcontractors on the Wisconsin Dells project citing them for two OSHA violations one of which involved facing a ladder, the same violation that Muir received (R Exh. 46). I note that this violation occurred in advance of the time that Muir announced to Endrizzi that he had initiated the OSHA investigation and was a union organizer.

Based on the forgoing, I am not persuaded that antiunion animus contributed to the issuance of the safety warning. If others disagree, I would find that Endrizzi would have issued

[4] Shanks testified that Muir had just been released from jail prior to being hired in early January 2002.

the safety warning to Muir even in the absence of his protected concerted or union activities. Therefore, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when Endrizzi issued the safety warning alleged in paragraph 8(d) of the complaint.

The General Counsel alleges in paragraph 8(e) of the complaint that on February 25, Ladika disciplined Muir.

Muir testified that on February 25, he was summoned to the trailer to meet with Ladika and Pavlick. Ladika gave him a second written warning for spreading "false information." In this regard, Ladika asserted that Muir had stated to Endrizzi that he talked to Ladika about concerns he had on fall protection at the Wisconsin Dells jobsite. Ladika contended that this never happened. Ladika also charged Muir because he had stated to two different employees that he was hired as a Foreman when he was actually hired as a Carpenter III. Ladika ended the conversation by informing Muir that this was his second warning and if he received an additional warning he would be terminated.

I am of the opinion that the issuance of this written warning was pretextual for the following reasons. First, there is no question that Ladika was aware that Muir had previously initiated the OSHA investigation and announced that he was a union organizer. Indeed, Endrizzi testified that he informed Ladika of these events and Ladika admitted them. Second, I previously found that Ladika informed Muir that he was upset with him because he initiated the OSHA investigation and that Muir was transferred to the Stoughton Bank project because of the OSHA investigation. Thus, there is an abundance of evidence of antiunion animus.

Concerning the first aspect of the written warning, Muir credibly testified that he apprised Endrizzi and Shanks about his concerns with fall protection on the Wisconsin Dells jobsite. He also testified and his sworn affidavit to the Board confirms that he mentioned the same concerns to Ladika while he visited the jobsite on or about February 12 or 13. Thus, I am of the opinion that Ladika was fully aware of Muir's concerns about the lack of fall protection provided for the men at the Wisconsin Dells jobsite. Moreover, Endrizzi testified and Ladika admitted that Endrizzi apprised him on February 12 about the fall protection issues expressed by Muir, and the Respondent called a special meeting on that date to address those concerns with the men. With regard to the second portion of the written warning, Shanks testified that he had a conversation in early January 2002 with Ladika because Muir had informed him that he was hired as a Foreman. Ladika informed Shanks that Muir was hired as a Carpenter III and not as a Foreman. According to Shanks, the matter never came up again and was resolved in early January 2002. Shanks also acknowledged that no employee ever complained directly to him that Muir claimed to be hired as a Foreman. While Ladika testified that a second employee complained about this issue, he was very vague and unable to pinpoint when it occurred. Indeed, the Respondent did not call the employee to testify. Accordingly, I conclude that the issue of Muir asserting that he was hired as a Foreman occurred in early January 2002 and was put to rest at that time. Indeed, no oral or written warnings were issued to Muir in January 2002 for spreading "false information."

Based on the forgoing, I conclude that Ladika gave the second warning to Muir due to his hostility that Muir had announced approximately 2 weeks earlier that he was the individual that initiated the OSHA investigation and revealed that he was a union organizer. Additionally, I note that Ladika never previously gave a written warning to any employee for spreading "false information." Finally, I find that the underlying reasons for the written warnings were either false or occurred weeks before the issuance of the warning and therefore, were solely manufactured to punish Muir for engaging in protected concerted and union activities. Therefore, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined Muir on February 25, as alleged in paragraph 8(e) of the complaint.

The General Counsel alleges in paragraph 8(f) of the complaint that Superintendent Carl Nelson disciplined Muir on March 7 (GC Exh. 4).

Muir testified that he received his third written warning on March 7 because he retained a cell phone on his person while he was working on the jobsite. Ladika and Pavlick came to the jobsite and informed Muir that this was his third written warning. Although Ladika had previously told Muir that he would be terminated if he received a third violation, he was not terminated but was informed if he did not immediately remove the cell phone he would definitely be terminated. Muir asked to see a copy of any written policy concerning cell phone usage but Pavlick said they did not have to show him proof of the policy.

Contrary to the General Counsel, I am not convinced that the discipline visited on Muir for use of his cell phone was violative of the Act. In this regard, although a new written policy on cell phone usage was not distributed to employees until April 2002, Respondent held a meeting with all Superintendents on February 22, and instructed them to announce to all employees the new cell phone policy. Although Muir denied in his testimony that no one at Respondent previously informed him about the new cell phone policy, he stated in his sworn affidavit given to the Board that Nelson informed him on February 25, that he was not to wear his cell phone on the jobsite and that this was a new company policy. I also note that Pavlick credibly testified that Assistant Superintendent Ric Bass complained to her on February 21, that Muir was on his cell phone constantly all morning long. Therefore, when Muir continued to carry his cell phone on his person and it rang during the day on March 7, Respondent was privileged to issue him a warning having previously informed all employees including Muir on February 25, that cell phones could not be used while working on the jobsite. Rather, employees were told that they could leave their cell phones in their cars or lunch boxes and could use them on break, at lunch or before or after work hours.

Based on the forgoing, and particularly noting that Muir admitted that he was informed on February 25 that he could not retain his cell phone on his person while working, I find that the written warning was a legitimate method of discipline unrelated to Muir's protected concerted or union activities. I further note, that Nelson signed the written warning and he had no involvement in the OSHA investigation or was present at the Wisconsin Dells jobsite when Muir announced that he was a union

organizer. While Ladika and Pavlick came to the jobsite and discussed the cell phone warning with Muir, it was Nelson who issued the warning when Muir initially refused to remove the cell phone from the jobsite and informed Nelson that he would remove the phone only if he saw something in writing.

Accordingly, I find that antiunion animus did not enter into the Respondent's reasons for issuing the written warning to Muir. Therefore, I conclude that Respondent did not violate Section 8(a)(1) and (3) of the Act when it disciplined Muir as alleged in paragraph 8(f) of the complaint. If others disagree, I would find that Respondent would have issued the discipline to Muir even in the absence of his protected concerted or union activities.

In light of my findings above regarding paragraph 6 and 7 of the complaint, I find that the General Counsel was privileged in revoking one provision of the settlement agreement in Case 30–CA–15489 and including paragraph 5 in the subject complaint (GC Exh. 3). I note however, after hearing the testimony surrounding the allegations alleged in paragraph 5 of the complaint, I did not find that Respondent violated the Act as alleged and recommended dismissal of that allegation.

C. Complaint 30–CA–16108 and 30–CA–16109

1. The 8(a)(1) allegations

The General Counsel alleges in paragraph 5 of the complaint that Respondent has maintained certain rules in its revised Employee Handbook that impermissibly restrict employee activity protected by the Act.[5]

The Board's standard for analyzing workplace rules like these is set out in *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), as follows:

> In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.
>
> Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.

With respect to the outside activities rule, the language contained in its first section is exceptionally broad and leaves to the total discretion of the Respondent what type of activities may be in conflict with the general welfare of the Company, have the appearance of impropriety, or might otherwise damage the Company's reputation, business, and performance of employee duties. However, the second portion of the rule that provides examples to incumbent employees sets the tone of what is expected by Respondent and provides a common sense understanding of the type of outside activities that would infringe on the rule. These guidelines, in my opinion, would clarify to a reasonable employee that Section 7 activity is not the type of conduct proscribed by the rule. Reading this language in context, employees would recognize that, it was intended to reach conduct similar to the examples given in the rule, not conduct protected by the Act. See *Tradesman International,* 338 NLRB 460 (2002).

Under those circumstances, I am of the opinion that the outside activities rules which have not been enforced do not have a chilling effect on Section 7 rights and their maintenance in the Employee Handbook is not violative of Section 8(a)(1) of the Act.

In regard to the portion of the Handbook that deals with employee solicitation and distribution of literature during working time and in working areas, the Board has addressed these issues on numerous occasions. In *Our Way,* 268 NLRB 394 (1983), the Board reaffirmed the view that rules prohibiting solicitation during working time are lawful. Similarly, the Board in *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615 (1962), held that distribution may lawfully be restricted both on worktime and in work areas.

Under these circumstances, I do not find that those portions of the Handbook chill employee Section 7 rights and recommend that those provisions not be found to violate Section 8(a)(1) of the Act.

With respect to the Handbook rule that deals with persons not employed by the Respondent, the Supreme Court held in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), that the employer's exclusion of nonemployee union organizers from the parking lot of its retail store, pursuant to its uniformly enforced rule against all solicitation and distribution on those premises was a legitimate action in accordance with the employer's property right. This holding is grounded on the proposition that the retail store was private property and the nonemployee union organizers in that case had no protected right of access to the respondent's private property. In the subject case, the majority of Respondent's construction activity is not undertaken on its own property but rather at construction sites owned by others. The Respondent is solely retained to engage in construction activities. The Respondent has submitted no evidence to establish that the construction sites where they perform work are owned by them or are considered to be private property. Likewise, there is no evidence in the record of the nature of the

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[5] The Handbook Rules provide:

Restrict Conflicting Outside Activities

In limiting employees' involvement in certain outside activities, we are not attempting to interfere in your personal life, but rather to protect the best interests of Stevens Construction Corp. and all its personnel. We cannot permit employees to pursue activities which, in the judgment of the Company, may be in conflict with the general welfare of the Company or have the appearance of impropriety, or which might otherwise damage our reputation or interfere with our business or the proper performance of your duties.

Certain activities which obviously are not proper for employees include but are not limited to employment with a competitor, use of the Company's time, facilities or equipment to engage in another business or occupation, and any outside activity which results in your losing time from work, being distracted from work, or otherwise performing unsatisfactorily, or which could result in an appearance of conflict. You should consult with our President before engaging in any activity which might b covered by this policy.

Obey Our Solicitation and Distribution Rules

No employees may solicit another employee for any purpose while either employee is on working time. The distribution of handbills or other literature during working time or in working areas is forbidden.

Persons who are not employed by us are prohibited from soliciting any employee or distributing literature on jobsites, premises or at employee work locations at any time.

relationship among the property owner, the general contractor, and the Respondent. Indeed, I note that the Respondent did not prohibit the Union from engaging in picketing on March 12, at the Stoughton Bank project. Under these circumstances, I find that the Respondent has not met the threshold burden of establishing that it had a property interest in the construction site that would entitle it to exclude individuals from the property. See *R & R Plaster & Drywall Co.,* 330 NLRB 87 (1999).

Therefore, the maintenance of the no solicitation and distribution rules to persons not employed by Respondent is overly broad and violates the Act. Moreover, since the words premises and work locations are not defined, the rule could reasonably be interpreted to preclude solicitation or distribution of literature in the areas that employees' park their cars, take their lunch and breaks or before and after work. Accordingly, I find the Respondent's maintenance of this Handbook rule to be overly broad and violative of Section 8(a)(1) of the Act.

2. The 8(a)(1) and (3) violations

The General Counsel alleges in paragraph 6(b) of the complaint that around mid-February 2002, eleven individuals filed employment applications for carpenter positions pursuant to ads placed by Respondent in various publications seeking carpenters. All of these applicants wore some type of union insignia such as jackets or hats identifying themselves as union members and indicated on their applications that they had worked for union employers.

The General Counsel further alleges that Respondent has failed and refused to consider for employment and/or hired any of the eleven applicants because of their membership in and activities in support of the Union.

The Board in *FES,* 331 NLRB 9 (2000), determined that the General Counsel must show in a discriminatory refusal to-hire violation the following at the hearing on the merits. First, that the respondent was hiring, or had concrete plans to hire. Second, that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. Third, that antiunion animus contributed to the decision not to hire the applicants. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. To establish a discriminatory refusal-to-consider violation, pursuant to *FES,* supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.[6]

There is no dispute that the Respondent hired a number of carpenters after the union applicants filed their job applications. In regard to carpenter positions that were filled by Respondent, three skill levels of carpenter proficiency were sought and a labor classification check list was attached to each application. All applicants were requested to check which level they thought their individual skill level fit. For example, carpenter positions at Respondent were separated into Carpenter I, II, and III levels, with Carpenter III possessing the highest skills and warranting the highest hourly pay rate.

In defending its decision to hire other individuals for the vacant carpenter positions, Respondent argues that the individuals that they hired possessed superior qualifications when compared to the union applicants. Additionally, the Respondent argues that a number of the union applicants demanded salaries higher then normally paid, had poor references, or failed to return telephone calls when they sought to inquire about questions with their applications or to discuss salary demands.

In regard to whether union animus contributed to the decision not to consider or hire the union applicants, I find that the General Counsel has established this element for the following reasons.

First I note that Mosel and Ladika made threatening statements to employees based on their protected concerted or union activities. Second, I find that Ladika visited discipline upon Muir due to his protected concerted activities and announcement that he was a union organizer on February 14, a period in time prior to the filing of the union applications on February 19 and 20. Third, I find that Ladika prevented Muir from returning to the Wisconsin Dells jobsite and subsequently transferred him to the Stoughton Bank jobsite because of his protected concerted activities and announcing that he was a union organizer.

In order to determine whether the individuals hired by Respondent had superior qualifications to the union applicants, a comparison of their training and experience must be undertaken.

a. The union applicants

Robert Hyatt (GC Exh. 6)

Hyatt filed an application for employment on February 21. At the time of his application he was unemployed but he listed prior union employers for whom he had worked. Hyatt applied for all three skilled level carpenter positions and indicated on his application that he had previously performed within those classifications. Based on my review of his application, Hyatt was eminently qualified to perform all functions of the Carpenter III position at Respondent. By letter dated March 8, Pavlick apprised Hyatt that his desired wage rate of $25 per hour is outside Respondent's initial pay scale for a Carpenter and his application was rejected.

[6] To establish a discriminatory refusal to consider and hire case, the General Counsel is required to prove the allocation of burdens set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Joshua Kepler (GC Exh. 7)

Kepler filed an application for employment on February 19, and wore a carpenter hat and shirt when applying in person at Respondent. His application shows that he had been a carpenter for about 1 year and he checked the Carpenter I skill level classification to indicate his proficiency. Respondent did not hire Kepler because during the reference check portion of the application process it was discerned that his prior employer intended to call him back to work on or about March 13.

Based on the forgoing, I find that this was a legitimate reason for not hiring Kepler and was totally unrelated to his union affiliation.

Darrelle LaBelle (GC Exh. 8)

LaBelle filed his application for employment on February 19, and wore a union hat when he applied in person at Respondent. His application shows that he described himself as a union organizer and indicated that he was qualified to perform Carpenter III skill level responsibilities. His testimony indicated that he was a journeyman union carpenter and had been in the field for 26 years. Respondent sent a letter dated March 8, which La Belle did not receive based on an incorrect street address that apprised him that the salary level of $22.66 per hour that he sought was outside the initial pay scale for a Carpenter position. Accordingly, his application was rejected.

Gary Miller (GC Exh. 10)

Miller filed his application for employment on February 19, and wore a union hat and shirt when he applied in person at Respondent. He applied for a Carpenter I position having been in the trade for approximately 2 years. His application shows two reference checks from his prior employers. Comments such as "no common sense, a talker, not a worker, limited knowledge and tried to work hard but didn't know much" were contained thereon. The application file checklist shows that Miller was not hired due to his poor references.

Based on the forgoing, I find that Miller was not hired because two prior employers gave him unfavorable references, rather than his affiliation with the Union.

John McGwin (GC Exh. 9)

McGwin filed his application for employment on February 19, and wore a union hat, shirt and jacket when he applied in person at Respondent. He applied for a Carpenter III position having been in the trade for approximately 9 years. By letter dated March 11, Pavlick rejected his application primarily because the hourly wage he sought of $22.66 is outside the Respondent's initial pay scale for a Carpenter. My review of McGwin's application establishes that he was an experienced carpenter who had also held a Foreman position at a prior employer.

David Parker (GC Exh. 11)

Parker filed his application for employment on February 19, and wore a union hat and shirt when he applied in person at Respondent. He applied for a Carpenter III position having been in the trade for approximately 12 years. By letter dated March 18, Pavlick rejected his application based on an unsatisfactory reference check from his prior employer. In this regard, Parker had been fired from his prior employer because of a drinking problem.

Cynthia Schaefer (GC Exh. 12)

Schaefer filed her application for employment on February 19, wore a union jacket when she applied in person at Respondent and listed former union employers on her application. She had been in the trade for a number of years and was certified as a journeyman carpenter. Accordingly, she applied for all available Carpenter positions at Respondent. Thus, I conclude that Schaefer was eminently qualified for all advertised Carpenter positions at Respondent. Both Ladika and Pavlick testified that the Respondent was making a special effort to hire qualified women and minority carpenters as none were presently employed. Schaefer's application was rejected because Respondent left a message with her daughter on March 8 to inquire about her desired hourly wage but no return call was ever received. Schaefer testified that she never received a message from Respondent on March 8, and while she has two daughters over 21, neither of them lived in her house on March 8. Indeed, one of her daughters lives approximately 100 miles away from her residence (GC Exh. 74). I also note on Schaefer's application that she earned hourly wages of $22.66 at her prior union employer, a wage that is outside Respondent's initial pay scale for a Carpenter.

Edward Steeb (GC Exh. 13)

Steeb filed his employment application on February 19, and wore a union hat, shirt and jacket when he applied in person at Respondent. His application shows excellent experience in the trade and he checked that he was capable of performing all the duties of a Carpenter III on Respondent's labor classification form. By letter dated March 8, Pavlick rejected Steeb's application because he sought an hourly wage of $22.66, a wage rate outside Respondent's initial pay scale for a Carpenter.

Scott Watson (GC Exh. 14)

Watson filed his employment application on February 19, and wore a union hat, shirt and jacket when he applied in person at Respondent. His application shows excellent qualifications having achieved journeyman carpenter status and serving as a Foreman at his most recent employer. By letter dated March 8, Pavlick rejected Watson's application because he sought an hourly wage of $22.66, a wage rate outside Respondent's initial pay scale for a Carpenter.

Kurt Wise (GC Exh. 15)

Wise filed his employment application on February 20, and wore a union hat and shirt when he applied in person at Respondent. His application shows excellent experience having achieved journeyman carpenter status at his most recent employer with a wage history in excess of $27 per hour. Respondent's applicant file checklist shows that a telephone message was left on March 8 for Wise to specify the hourly wage he was seeking. Wise testified that he never received a telephone message from Respondent and therefore, could not have returned the call. In any event, Wise was not hired as a Carpenter at Respondent.

Aaron Zimmerman (GC Exh. 16)

Zimmerman filed his employment application on February 19, and wore a union hat and shirt when he applied in person at Respondent. His application shows that he possessed the qualifications of a Carpenter I and had a solid employment history. Respondent did not hire Zimmerman because he was called back to work at his former employer on March 11. Since Zimmerman's testimony confirmed this, and his return to work took place prior to the Respondent completing its reference checks, I find that this was a legitimate reason for not hiring Zimmerman. Thus, I conclude that Respondent's reason for not hiring Zimmerman was unrelated to his union affiliation.

b. Carpenter's hired by Respondent

Michael Farr (GC Exh. 19)

Farr filed his employment application on March 1, and indicated he was qualified to perform the duties of a Carpenter Laborer, Concrete Laborer and a Carpenter I. He possessed good references at his prior employer and was hired on April 5 as a Carpenter Laborer earning $13 per hour despite not performing carpentry duties since June 2000. His most recent employment experience was as a banquet cook.

Craig Vorwald (GC Exh. 20)

Vorwald filed his employment application on March 19, and indicated he was qualified to perform the duties of a Carpenter II. He did not fully complete the employment application but attached a resume that showed some experience as a carpenter, the most recent being in January 2000. His prior employer was Dubuque Greyhound Park & Casino where he held a security position until August 2001. Vorwald was hired on April 2, as a Carpenter II with a starting salary of $15 per hour.

Kenneth Ruegsegger (GC Exh. 21)

Ruegsegger filed his employment application on March 27, and listed that he had previously been employed with the Respondent in 1999 but was presently self-employed. Respondent hired Ruegsegger as a Carpenter III on April 8, with a starting wage of $20 per hour. At the time Ruegsegger left Respondent's employ to start his own business, he was the highest paid carpenter on its payroll.

Jason Genord (GC Exh. 22)

Genord filed his employment application on April 18, but did not check the positions he thought he was qualified for on the labor classification form. Likewise, Genord did not complete the employment experience portion of the employment application. Rather, he attached a resume to the application that shows his prior experience as a farmer and a fabricator/welder, handling equipment and custom fabrication of heat-treating furnaces. Respondent hired Genord on May 16 as a Carpenter I with a salary of $13 per hour. I find that Genord's experience and background is not as substantial as the union applicants.

Matthew Wellenketter (GC Exh. 23)

Wellenketter filed his employment application on April 22, but did not check any of the positions on the labor classification form that he qualified for. His application shows that he was scheduled to graduate from the University of Wisconsin with a degree in Civil Engineering and Construction Management. His resume indicates that his objective for employment includes a construction or engineering firm, with interests in project management and structural design. Wellenketter was hired on June 10, as a Carpenter I at an hourly wage of $17 per hour.

Based on the above, it does not appear that Wellenketter had extensive experience as a carpenter in comparison to the union applicants. Additionally, as a college graduate, it is unlikely that he would remain in a carpenter position for a lengthy period. Indeed, his interests are primarily in project management and structural design.

Clay Tyler (GC Exh. 24)

Tyler renewed his interest in being hired at Respondent on April 24, having previously been rejected by Pavlick's letter dated November 16, 2001 due to lack of construction experience. In his initial application filed on November 15, 2001, he applied for a frame carpenter position. Tyler was hired on May 16 as a Carpenter II, with a starting hourly wage of $18.

I note that Ladika testified that if an individual application was previously rejected, it was highly unlikely that such a person would be considered for a future position. Additionally, I note that approximately five months had elapsed from Tyler's prior application and no new application was filed when he renewed his interest in employment.

Samuel Adams (GC Exh. 25)

Adams filed his employment application on May 6, and sought a Carpenter I position. His application shows that he had some experience as a carpenter but not extensive and his most recent carpentry duties ended in May 2001 when working for his father's company. Respondent hired Adams on August 1, as a Carpenter Laborer with a starting salary of $13 per hour.

Patrick Kingsland (GC Exh. 26)

Kingsland filed his employment application on May 15, and sought a Carpenter II position. He had previously worked as a carpenter for his most recent employer earning $17 per hour. Respondent hired Kingsland on June 3, as a Carpenter II earning $19 per hour, an increase over his prior position. The General Counsel raised the issue of Kingsland being hired at a time when a relative was employed by Respondent as contrary to a provision in the Employer's Handbook (GC Exh. 2, page 10, Employment of Relatives). Pavlick credibly testified that even if close relatives are employed at Respondent, it is permissible as long as one of the employees does not work under the direct or indirect supervision or the same Department as the person with whom he or she has the relationship.

Based on the forgoing, I do not believe that a violation of the Employer's Handbook has been established. Rather, I note that the hiring of Kingsland is unique in that he was hired at a higher hourly rate than he previously was making at his prior employer.

Robert Stewart (GC Exh. 27)

Stewart filed his employment application on May 21, seeking a carpenter position. He was hired on June 14 in the classification of a Carpenter Laborer at the hourly rate of $12. His most recent experience as a carpenter was in 1999 when he

built houses for a low-income family school program.

Glen Colver (GC Exh. 28)

Colver filed his employment application on June 11, seeking a Carpenter I position. He had good experience as a junior carpenter having been paid $10 per hour while performing carpentry work at his prior employer. Colver was hired on June 26 as a Carpenter Laborer at the hourly rate of $13.

Richard Schuch (GC Exh. 29)

Schuch sent an e-mail message to Respondent on June 19 with his resume attached. He was seeking a project management or supervisory position paying $45,000 per year or $21.63 per hour. On July 1, Schuch filed a formal application and indicated he was applying for a Carpenter III or Assistant Foreman position and sought $52,000 per year or $25 per hour. Respondent hired Schuch on July 18 as a Carpenter III at the hourly wage of $20.

Based on the forgoing, I question why Schuch's resume and formal application that requested a wage rate outside Respondent's initial pay scale was not rejected similar to the union applicants and consistent with Ladika's testimony that such applications were automatically rejected without an interview.

David Woodson (GC Exh. 30)

Woodson filed his employment application on June 21, seeking an apprentice carpenter position. His application shows that he was in the formative stages of his career having been in the trade for approximately 2 years. Respondent hired Woodson on July 17 as a Carpenter Laborer at the hourly rate of $14.

Allen Chase (GC Exh. 31)

Chase filed his employment application on July 19 and applied for a carpentry position. His application shows that he was self-employed from April 1999 to March 20, performing carpentry work and earned $15 per hour. Respondent sent out two reference forms to the two employers that Chase had listed on his application. One employer just confirmed his dates of employment while the other employer reported that Chase was terminated for not showing up for work. Despite learning of Chase's termination from the former employer, Respondent sent him a letter seeking additional information to complete his application and to schedule an employment interview. The records establish that Chase was offered a position as a Cement Finisher I at the hourly rate of $16 but did not commence employment as he was put in jail before his scheduled start date (R Exh. 5)

Based on the above I note that Chase, despite having an incomplete application and a poor reference check, was given an interview and offered a position at Respondent unlike the union applicants.

Tommy Steig (GC Exh. 32)

Steig filed his employment application on July 22, and sought a Carpenter I position. He was self-employed at the time of his application but asserted that the work was not steady enough. His references were good and Respondent hired him on August 14 as a Carpenter I at the hourly rate of $15.

German Julian (GC Exh. 33)

Julian filed his employment application on July 24, and applied for a carpenter position. His application shows that his most recent employment was in the food service industry. Julian also did some painting in the construction industry. He listed that he possessed special skills with windows, doors and cabinets. Respondent hired Julian on August 5 as a Carpenter I at the hourly rate of $13.

Richard Pochopien (GC Exh. 34)

Pochopien filed his employment application on July 25, and applied for a Carpenter II position. His application shows that in his most recent position effective June 2002, he was a field Superintendent and was paid $22 per hour. While he had excellent references, unlike the union applicants, his application was not rejected because he sought a desired wage rate outside the initial pay scale for a Carpenter. Indeed, he was hired on August 9 at the hourly rate of $18 with a provision that his salary would be reviewed after 30 days on the job. None of the union applicants were given this opportunity and a number of those applicants possessed qualifications at least equal to Pochopien.

Carl Smith (GC Exh. 35)

Smith filed his employment application on July 28, and applied for a Carpenter II position. His application shows that in his most recent position effective July 24 he was a day laborer performing laborer, carpenter, housekeeping and production work. The application also notes that he has experienced sobriety issues in the past and was terminated from one of his prior employers because of attendance problems. Despite having these matters noted on his application, Respondent hired Smith on August 9 as a Carpenter II at the hourly rate of $16. William Kennedy (GC Exh. 36)

Kennedy filed his employment application on July 30, and applied for a trim carpenter position. His application shows that in his most recent self-employed position, he was responsible for all types of small jobs including light electrical work, installation of floors and trim carpentry work. Prior to that job, he was an assembly molder from 1996 to 2000. Respondent hired Kennedy on August 14 as a Carpenter II at the hourly rate of $17.

c. Analysis

The General Counsel, in addition to alleging refusal to hire violations, has asserted that the Respondent has refused to consider the union applicants for employment. Contrary to this argument, I find that the Respondent did consider the union applicants and did not exclude them from the hiring process. In this regard, each of the above union applications was reviewed, processed and considered. In some instances telephone calls were placed to the union applicants to verify desired salaries or to clear up matters listed on the application. Thus, contrary to the General Counsel, I recommend that those complaint allegations be dismissed.

With respect to the refusal to hire allegations alleged in the complaint, I find that the Respondent did not hire some of the union applicants because of their union affiliation and therefore violated Section 8(a)(1) and (3) of the Act. The following

represents my reasons for this finding. First, I note that none of the union applicants were contacted by the Respondent to see if they would consider taking a lower hourly wage or consider a carpenter laborer position unlike the non-union applicants, some of who accepted reduced hourly wages from what they previously earned. Second, union applicants were routinely rejected if they requested a salary or their wage history showed a wage rate outside Respondent's initial pay scale for a Carpenter. Nonunion applicants that were hired were not routinely rejected if they listed in their applications a salary or wage history outside Respondent's initial pay scale for a Carpenter. Additionally, a number of the nonunion applicants that were hired were given the opportunity to interview with Respondent even if their applications showed a wage history that was outside Respondent's initial pay scale for a Carpenter. Union applicants were not afforded this same accommodation and no union applicant listed in the complaint was offered an interview with Respondent. Third, union applicants were routinely rejected based on poor reference checks. This was not the case for nonunion applicants. For example, union applicants who either acknowledged or their reference checks uncovered past alcohol problems were routinely rejected (Parker), while nonunion applicants were given an interview and hired (Smith). Likewise, union applicants that received poor reference checks were routinely rejected while nonunion applicants that also received poor reference checks were hired (Chase was also convicted of a felony involving child support and Smith). Fourth, despite Respondent's policy according to Ladika of not considering applications that were previously rejected, Respondent hired nonunion applicant Tyler. Fifth, in comparing the qualifications of the union applicants with the nonunion applicants, it is abundantly clear that the union applicants had substantially more years in the trade and greater experience than the majority of the carpenters or carpenter laborers hired by the Respondent. Lastly, both Ladika and Pavlick confirmed that one of the primary goals of Respondent was to hire qualified minority and women carpenters as none were employed during the critical period. In this regard, Schaefer was eminently qualified having achieved journeyman carpenter status. While the Respondent asserts that it did not hire Schaeffer because she did not return their one telephone call, I find this reason to be pretextual. Indeed, as discussed above, the Respondent routinely sent out second letters to nonunion applicants or made second telephone calls to seek information. Since Respondent put a great deal of emphasis on seeking out and hiring qualified women carpenters, their reasons for not hiring Schaefer do not withstand scrutiny.

In summary, I find that the reasons advanced by Respondent for not hiring the union carpenter applicants alleged in the complaint with the exception of Kepler, Miller, and Zimmerman to be pretextual. I note that the Respondent did not hire even one of the union applicants listed in the complaint. Indeed, I find the Respondent would have hired the eight individuals (Hyatt, LaBelle, McGwin, Parker, Schaefer, Steeb, Watson, and Wise) but for their union affiliation. Under *Wright Line,* I find that the Respondent did not meet its burden that it would have taken the same action even if the employees had not engaged in protected activity.

The Respondent argues that the hiring of union applicant Todd Bloyd (GC Exh. 38) confirms that it did not possess union animus and it fully considered his employment application. Bloyd filed his employment application on April 18, and applied for a concrete finisher position. He listed in his application that he was a union organizer and intended to organize the Respondent's employees. On April 22, he amended his application to include leadman and Foreman positions. By two separate letters dated April 30, Respondent rejected his application stating that they were looking for applicants with more experience and no concrete laborer positions were available. According to Pavlick, because Bloyd was persistent, he was granted an interview with Pavlick and Vice President of Operations Hein on May 17. Bloyd tape-recorded the interview and a transcript was made (GC Exh. 69). After the completion of the interview, Bloyd whose primary experience was working with concrete was offered a position as a carpenter. He commenced employment on June 3 but worked only 2 weeks as the Union instructed him to leave the job.

Although the Respondent did hire Bloyd knowing that he was a union organizer, I do not place significant emphasis on this hiring as it occurred at a time after Respondent had rejected all of the earlier carpenter union applicants. Moreover, when the Respondent hired Bloyd they knew he did not possess carpentry skills and had not Bloyd voluntarily left his job, it could have provided the Respondent a legitimate reason to terminate him.[7] In any event, the hiring of one union applicant after rejecting all other carpenter union applicants does not shelter the Respondent's prior illegal actions under the Act.

D. Complaint 30–CA–16196

1. The union applicants

The General Counsel alleges in paragraph 5 of the complaint that the Respondent since February 2002 placed ads in various publications seeking concrete laborers and cement finishers. On April 18, three union applicants applied for laborer positions but since April 25, Respondent has failed and refused to consider these individuals for employment and/or hired them. Rather, beginning May 7, Respondent hired at least 23 employees for positions for which the union applicants were qualified. In order to compare the qualifications of the three union applicants with a number of the individuals hired by Respondent, an analysis of their backgrounds and experience will be undertaken.

a. Steve Cagle (GC Exh. 39)

Cagle filed his employment application with Respondent on April 19, and sought employment working with concrete. He checked on the labor classification form that he was proficient to work in the positions of carpenter, concrete, or general laborer. Cagle noted on his application that he was a union organizer and possessed prior experience with union companies as a Foreman and laborer working with concrete. Respondent telephoned Cagle and it is noted on the application that he was

[7] Ladika testified that during his tenure as Production Manager, the hiring policy did not permit someone to apply as a laborer and be hired as a carpenter.

willing to accept wages of $10 per hour despite being paid $20 per hour in prior positions. By letter dated April 30, Respondent informed Cagle that they did not have any concrete labor positions available at that time but would keep his application on file, and if any positions became available that suited his skills, he would be contacted.

b. John Matthews (GC Exh. 40)

Matthews filed his employment application with Respondent on April 18, and sought employment as a laborer. His application notes that he has experience working with underground utilities and a salary history in excess of $20 per hour. Respondent's employee checklist file notes that Matthews did not possess concrete or carpentry experience and was seeking wages higher then their pay scale. By letter dated April 30, Respondent apprised Matthews that they were looking for applicants with more experience but they would keep his application on file, and if an opportunity became available that suited his skills he would be contacted.

c. Karl Markgraf (GC Exh. 41)

Markgraf filed his employment application with Respondent on April 25, and sought work as a laborer. His application shows that since 1993 he had excellent experience with a union employer performing various types of laborer work at an hourly wage of $19 to $21. Respondent's employee checklist file notes that they were not hiring laborers at this time and Markgraf's salary demands were too high. By letter dated April 25, Respondent informed Markgraf that they did not have any laborer positions available but his application would be kept on file in the event that any positions became available that suited his skills.

2. Employee's hired by Respondent

a. Anthony Butze (GC Exh. 43)

Butze filed his employment application on March 7, and sought work as a general laborer. His application shows that his most recent employment since December 2000 to the present was not in the construction industry but he did have some prior experience working with concrete from 1995 to 1999. The application notes a number of laudatory references. He was hired as a concrete laborer on May 15, at the hourly wage of $13.

b. Mathew Young (GC Exh. 44)

Young filed his employment application on May 17, and sought a concrete laborer position. His most recent experience as a construction laborer took place between 1988 and 1994. By letter dated May 22, Respondent notified Young that it did not have any positions available but it would keep his application on file, and notify him if an opportunity arose that suited his skills. Respondent, on July 16, contacted Young to schedule an interview and discuss desired wages as Young had previously indicated that he would discuss that issue on his earlier filed application. Respondent, after the interview, hired Young as a concrete laborer at the hourly wage of $14.

c. Alberto Vasquez (GC Exh. 46)

Vasquez filed his employment application on July 30, and sought work as a carpenter, concrete or general laborer. His application shows that his most recent experience for the last 3 years was not in the construction industry. Rather, Respondent's interview sheet indicates that while he lived and worked in Mexico prior to 1998, he had some experience as a laborer working with concrete. Respondent hired Vasquez as a concrete laborer earning $13 per hour.

d. Lori Brisbois (GC Exh. 47)

Brisbois filed her employment application on August 19, and sought work as a general laborer. Brisbois's application indicates that she had no experience in construction, the majority of her work history having been in the restaurant and ground maintenance/landscape industries. Indeed, by letter dated September 5, Respondent rejected her application indicating that it did not have any positions available as a general laborer. Thereafter, on September 11, Respondent telephoned Brisbois and left a message for her to call to schedule an interview. When Respondent did not immediately hear from Brisbois, they made a second attempt to reach her on September 16, to schedule an interview. Brisbois was subsequently hired as a general laborer at the hourly wage of $12.[8]

e. Kerry Deal (GC Exh. 48)

Deal filed her employment application on August 26, and sought work as a carpenter or laborer. Her application shows that she had prior experience as a laborer in her most recent position and excellent references at that employer in addition to prior employers. Deal was hired as a carpenter laborer at $14 per hour.

f. Martin Ringelstetter (GC Exh. 50)

Ringelstetter filed his employment application on September 9, and sought work as a concrete laborer. His application shows that he had previous concrete experience and received excellent references from his prior employers. While he earned in excess of $15 an hour at his prior position, Respondent granted him an interview and offered him the position of concrete laborer which he accepted at $13 per hour.

g. Gerald Doyle (GC Exh. 51)

Doyle filed his employment application on September 12, and sought either a concrete laborer or carpenter laborer position. His application shows no experience in the construction industry since September 2000, but prior to that time he did work with concrete while building homes and garages in Puerto Rico. Doyle was granted an interview and was hired as a concrete laborer at $12 per hour.

h. Adam Huff (GC Exh. 52)

Huff filed his employment application on September 13, and sought a position working with concrete. His application shows that he had prior experience working with concrete and favorable references from his prior employers. Huff was granted an interview and was hired on October 7, as a concrete laborer at the hourly rate of $13 per hour.

[8] I note striking differences in the repeated attempts to reach Brisbois in comparison to Schaefer.

i. Douglas Kennedy (GC Exh. 53)

Kennedy initially filed his employment application on May 24, and sought work as a carpenter laborer. His application shows some experience in 2001 with framing buildings and installing windows. The reference check produced good prior employer references. By letter dated June 3, Respondent rejected his application stating that it was looking for candidates with more experience for the projects that it presently had. The letter did not state that it was keeping his application on file. Thereafter on September 20, Kennedy contacted the Respondent and requested that he be reconsidered for any carpenter laborer positions that might be available. An interview was scheduled for September 27, and Kennedy was offered a carpenter laborer position at the hourly wage of $12.

j. Luis Medina (GC Exh. 54)

Medina filed his employment application September 30, and sought a general laborer position. His application shows some experience in construction working with concrete. By letter dated October 1, Respondent rejected his application, stating that they have filled their needs for any available positions. Medina telephoned the Respondent on October 1, and asked to be considered for a concrete position. By letter dated October 7, Respondent informed Medina that it has filled all present needs for concrete laborers. By letter dated October 31, Respondent notified Medina that its hiring needs changed and they were seeking several concrete laborers. An interview was scheduled and Medina was hired as a concrete laborer at the hourly wage of $12.

k. Russell LeFevre (GC Exh. 55)

Le Fevre filed his employment application on October 3, and sought a concrete laborer position. His application shows prior experience working with concrete. While one of his prior references was favorable, the second reference indicated that he left the employer twice with no warning. Respondent, nevertheless, scheduled an interview for October 22, and LeFevre was hired on October 28, as a concrete laborer at the hourly wage of $16.

l. Steve Weber (GC Exh. 57)

Weber filed his employment application on April 15, and sought a concrete finisher position. His application shows that he desired a wage rate in the range of $22 to $25 per hour. Despite seeking a wage rate outside Respondent's initial pay scale for a concrete finisher, unlike the union applicants, Weber was granted an interview and hired as a concrete finisher II at the hourly rate of $20.

m. Frederick Amacher (GC Exh. 59)

Amacher filed his employment application on July 22, and sought a concrete finisher position. His application shows that he desired a wage rate of $22 per hour. Despite seeking a wage rate outside Respondent's initial pay scale for a concrete finisher, unlike the union applicants, Amacher was hired as a concrete finisher II at the hourly rate of $18.

n. Martin Holtan (GC Exh. 61)

Holtan filed his employment application on August 17, and sought a concrete finisher I position. His application shows a desired wage rate of $20 per hour and at his most recent employer he earned $22 per hour. Despite seeking a wage rate outside Respondent's initial pay scale for a concrete finisher I, unlike the union applicants, Holtan was afforded an interview on September 13, and hired as a concrete finisher I at the hourly rate of $17.

o. Michael Powers (GC Exh. 62)

Powers filed his employment application on August 21, and sought a concrete foreman or finisher position. His application shows a desired wage rate of $23.50 per hour. Despite seeking a wage rate outside Respondent's initial pay scale for a concrete finisher II position, unlike the union applicants, Powers was afforded an interview on August 26, and was hired as a concrete finisher II at the hourly rate of $20.

p. Larry Blaisdell (GC Exh. 65)

Blaisdell filed his employment application on September 13, and sought a concrete finisher position. He was offered an interview, unlike the union applicants, and the notes from the interview indicate that he was not a highly experienced finisher. Despite this observation, Blaisdell was hired as a concrete finisher I at the wage rate of $14 per hour.

q. Sean Blake (GC Exh. 66)

Blake filed his employment application on September 18, and sought a concrete finisher position. His application shows a desired wage rate of $18 to $20 per hour. Despite seeking a wage rate outside Respondent's initial pay scale for a concrete finisher I position, unlike the union applicants, Blake was given an interview on October 2, and was hired as a concrete finisher at the hourly rate of $16. I also note that Blake's application contained a reference with the comment "Had a hard time getting him to work" and he left without giving the former employer an explanation.

r. Alan Chase (GC Exh. 67)

Chase filed his employment application on October 28, and sought a position working with concrete. While his application shows that he had worked in the construction industry for 20 years and had an excellent background working with concrete, there are no reference checks included in the packet. Indeed, Chase was self-employed in his most recent position and the Respondent consciously made it a practice of obtaining references from clients that a self-employed person had worked for. Contrary to past practice, and while routinely checking references for similarly situated union applicants, Respondent hired Chase as a concrete finisher I at the wage rate of $16 per hour.

3. Analysis

Applying the *FES* guidelines, discussed above, I find that Cagle, Mathews, and Markgraf were eminently qualified to perform the duties and responsibilities of the carpenter, concrete or general laborer positions for which they applied.

In comparing the treatment given to the union applicants with those concrete laborer and concrete finishers hired by the Respondent, I note glaring differences. For example, unlike the union applicants that listed desired wages outside the Respon-

dent's pay scale, nonunion applicants who did the same were granted interviews and in most instances hired (Ringelstetter, Weber, Amacher, Powers, Blake, and Holtan). Additionally, unlike union applicants who were informed that their applications would be retained on file if positions became available that suited their skills and never contacted, nonunion applicants who were told the same thing were routinely contacted, granted interviews and hired (Young, Brisbois, Kennedy, and Medina). Likewise, non-union applicants were contacted if they did not initially respond to Respondent inquiries, while union applicants were never given this opportunity (Young, Brisbois, Kennedy, and Medina). Lastly, at least two of the nonunion applicants that were hired (LeFevre and Blake) had questionable references yet they were still given interviews and hired by the Respondent.

Based on the forgoing, and noting above that the Respondent exhibited union animus, I find that the three union applicants were not hired solely because of their affiliation with the Union. In this regard, I find that each of the three union applicants were eminently qualified for the positions that they applied for and possessed superior qualifications to at least more than three individuals hired by Respondent. Applying the *Wright Line* guidelines, Respondent has not demonstrated that it would have taken the same action even in the absence of the applicant's union activities. Thus, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it refused to hire the three union applicants alleged in paragraph 5 of the complaint. Contrary to the General Counsel, I do not find that the Respondent refused to consider for hire the three applicants or excluded them from the hiring process. In this regard, although the Respondent did not hire the three individuals, they received and logged in their applications along with other employee applicants, reviewed them, and contacted one of the union applicants to discuss salary demands. Under these circumstances, I recommend that the refusal to consider violations alleged by the General Counsel be dismissed.

E. Affirmative Defenses

The Respondent has proffered a number of job applications (R Exh. 11 through 37) to establish that it treated nonunion applicants that were not hired identically to the union applicants that were not hired. In this regard, Respondent argues that both before and after the times that it did not hire the union carpenter applicants or the laborer applicants, it applied the same hiring criteria consistently. For example, nonunion applicants were rejected when hiring needs did not warrant additional employees, their applications showed a lack of experience for the positions applied for, applicants desired a wage rate outside Respondent's initial pay scale, employee's did not respond to e-mail requests for additional information and reference checks revealed undesirable traits or skills. While I agree that the above noted applications stand for the propositions represented, I am not convinced that it should be determinable in the subject case. Rather, I find that the Respondent did not follow its hiring guidelines when comparing the union applicants that were rejected with the nonunion applicants that were hired. As noted above, I find that the consideration received in evaluating both sets of applications was strikingly different for those applicants hired in comparison to the union applicants that were rejected.

For all of the above reasons, I find that the Respondent did not hire the union applicants alleged in the complaint because of their union affiliation.[9]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when Production Manager James Ladika and Superintendent David Mosel threatened employees because of their union affiliation.

4. Respondent violated Section 8(a)(1) and (3) of the Act when it barred employee James Muir from returning to work, denied him the opportunity to earn wages for the day, transferred him to another jobsite and disciplined him because of his union activities. Respondent further violated Section 8(a)(1) and (3) of the Act when it refused to hire Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Mathews, and Karl Markgraf because of their union affiliation.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend that the Board issue a remedy requiring the instatement of the eleven above named employees together with backpay and interest. Likewise, James Muir should be reimbursed for the wages he lost on February 15, 2002. I further recommend that the Board order Respondent to offer the eleven employees instatement to those or substantially equivalent jobs without prejudice to their seniority or any other rights or privileges. It should also order Respondent to make them whole for lost earnings, if any, together with interest. Backpay should be computed from the date they would have been hired less any net interim earnings, as prescribed in *F.W. Woolsworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the

[9] During the course of the hearing and after it had rested its case, the General Counsel moved to amend the complaint to add the names of union applicants Shawn Dressler and Dan Larson who filed applications on February 20 as additional individuals that the Respondent refused to consider or hire because of their union affiliation. This request to amend the complaint was made after their applications were introduced by Respondent and revealed they were union organizers in the special skills and qualifications section (R Exh. 13 and 14). I rejected the amendment since it occurred during the course of the hearing and due process warranted that the Respondent have more time to prepare for the amendment. Since at least one of the complaints in this matter has been outstanding since 2001, and several postponements of the litigation were granted, it was incumbent on the General Counsel to have included those individuals in the complaint in a timely manner. Under these circumstances, I renew my ruling and find that it was not appropriate for the General Counsel to amend the complaint during the course of the hearing and at a time after it had rested its case in chief.

entire record, I issue the following recommended[10]

ORDER

The Respondent, Stevens Construction Corp. Madison Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening not to hire employees because of their affiliation with a union.

(b) Threatening employees because of their union affiliation.

(c) Threatening to arrest or discharge employees for their affiliation with a union or engaging in protected concerted activities.

(d) Maintaining a work rule that states "persons who are not employed by us are prohibited from soliciting any employee or distributing literature on jobsites, premises or at employee work locations at any time."

(e) Barring an employee from returning to work, denying him the opportunity to earn wages for the day and transferring the employee from one project to another because of his union affiliation or protected concerted activities.

(f) Disciplining an employee because of his union affiliation or protected concerted activities.

(g) Refusing to hire applicants because of their affiliation with a union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Mathews, and Karl Markgraf instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

(b) Make Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Mathews, Karl Markgraf, and James Muir whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the decision.

(c) Rescind the work rule quoted above and advise the employees in writing that the rule is no longer being maintained.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire the above named individuals, any reference to the discipline of James Muir and within 3 days thereafter notify the applicants and James Muir in writing that this has been done and that the unlawful refusals to hire and the discipline will not be used against them in any way.

(f) Within 14 days after service by the Region, post at its facility in Madison, Wisconsin, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 7, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees for their affiliation with a union.

WE WILL NOT threaten to arrest or discharge our employees for their affiliation with a union or for engaging in protected concerted activities.

WE WILL NOT maintain the following Work Rule

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Persons who are not employed by us are prohibited from soliciting any employee or distributing literature on jobsites, premises, or at employee work locations at any time.

WE WILL NOT bar employees from returning to work, deny them the opportunity to earn wages for the day or transfer employees from one project to another because of their union affiliation or protected concerted activities.

WE WILL NOT refuse to hire applicants because of their affiliation with a union.

WE WILL NOT discipline employees because of their union affiliation or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Mathews, and Karl Markgraf instatement to a job for which they applied or a substantially equivalent position without prejudice to their seniority or any other rights or privileges.

WE WILL make Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Mathews, Karl Markgraf, and James Muir whole for any loss of earnings and other benefits suffered as a result of the discrimination against them together with interest.

WE WILL rescind the work rule quoted above and advise the employees in writing that the rule is no longer being maintained.

WE WILL, within 14 days from the date of the Board's Order remove from our files any reference to the discipline of James Muir and the unlawful refusals to hire applicants Robert Hyatt, Darrell LaBelle, John McGwin, David Parker, Cynthia Schaefer, Edward Steeb, Scott Watson, Kurt Wise, Steve Cagle, John Mathews, and Karl Markgraf, and WE WILL within 3 days thereafter notify James Muir and the applicants in writing that this has been done and that the discipline and the unlawful refusals to hire will not be used against them in any way.

STEVENS CONSTRUCTION CORP.